U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 99 233 52270 Office: CALIFORNIA SERVICE CENTER Date: SEP 17 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a car wash. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated on the Form ETA 750 in Part A, block 14 (the labor certification), as of the priority date. It is the date that the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is September 26, 1997. The beneficiary's salary as stated on the labor certification is $37,315.20 per year.

Counsel initially submitted the letter, dated August 10, 1997 and signed by [redacted] (*Gerente* letter 1). It stated, in English, on letterhead of Lavado Perfecto, S.A., of the Federal District of Mexico, that the beneficiary worked at as a maintenance mechanic from January 1987 to May 1989, about 28 months [redacted] letter 1 listed duties of the job in the same words, somewhat rearranged, as Form ETA 750, Part A, block 13, as evidence of the beneficiary's prior experience in the job offered. The labor certification required four (4) years of experience in the job offered.

In a request for evidence (RFE) dated August 26, 2000, the director required evidence to establish that the beneficiary possessed the prior experience. In addition, the director required that the previous employer verify the beneficiary's title, duties, and dates of experience, and the number of hours worked per week.

In response to the RFE, the petitioner virtually replicated [redacted] letter 1, but added to the claim of employment that it was "on full-time 40-hour week." This submission bore the date September 9, 2000 (*Gerente* letter 2).

The director mistakenly determined that [redacted] letters 1 and 2 alleged only one (1) year and four (4) months of the requisite experience, though they clearly stated 28 months. Since they did not, in either case, establish the four (4) years required by Form ETA 750, the director necessarily concluded that the beneficiary did not meet minimum requirements that the labor certification had established and denied the petition.

Counsel asserts, on appeal, that the beneficiary did possess more than four (4) years of qualifying experience in the job offered. The sole evidence of this is an undated letter signed by [redacted] *General* [redacted] stated, in English, on letterhead of [redacted] of the Federal District of Mexico, that the beneficiary worked as a full-time employee 40 hours per week from May 1983 to December 1986 as a maintenance mechanic.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R.§§ 103.2(b)(8)(i)-(iii). Within the 12 weeks allowed, the petitioner may submit all the requested initial or additional evidence, submit some or none of the additional evidence and ask for a decision based on the record, or withdraw the petition. *See* 8 C.F.R. § 103.2(b)(11). If the evidence in response to an initial request does not establish eligibility for the benefit at the time of the filing of the petition, the petition will be denied. *See* 8 C.F.R. § 103.2(b)(12).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, but the petitioner offered proof of experience of only 28 months. The director will issue a decision based on existing submissions in the record. If failure to produce requested evidence precludes a material line of inquiry, the director may deny the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, the AAO will not consider the *Gerente General* letter, first presented on appeal, for any purpose. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The petitioner did not even allege that employment in Form ETA 750, Part B, block 15. [1] The appeal will be adjudicated based on the record of proceeding before the director.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the priority date. The Form ETA 750 indicated that the position of a maintenance mechanic required four (4) years of experience in the job offered. *Gerente* letters 1 and 2 fall short of this proof by at least 20 months. Therefore, the petitioner has not overcome this portion of the director's decision.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[1] The *Gerente General* letter and claim of employment, moreover, conflicts with the beneficiary's asserted status as a B.A. degree candidate in architecture at Tecamachalco, Mexico from September 1982 to July 1987. *See* Form ETA 750, Part B, block 11.